IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of JAMES DONALD NEIDIGH, Petitioner.	)	NO. 61188-7-I
	)	DIVISION ONE
	)	Unpublished Opinion
	)	FILED: May 26, 2009

Lau, J. — In this personal restraint petition, James Neidigh challenges the Department of Corrections' (DOC) authority to revoke his prison-based drug offender sentencing alternative (DOSA). He contends that DOC lacked statutory authority to revoke his DOSA while he is serving the prison portion of the DOSA sentence. But RCW 9.94A.660(5) authorizes DOC to revoke an offender who is in prison if the offender fails to complete or is administratively terminated from the DOSA treatment program. Neidigh also argues that DOC violated his due process rights. But we conclude that the hearing procedures used here were adequate to assure that Neidigh received the process he was due. Therefore, we deny Neidigh's petition.

FACTS

In August 2006, James Neidigh pleaded guilty to a single count of unlawful delivery of a controlled substance (cocaine). On August 17, the court imposed a DOSA sentence of 90 months, half to be served in total confinement and half in community custody. RCW 9.94A.660(5). After the sentence, Neidigh signed a "DOSA agreement" and another form outlining the requirements for participation in chemical dependency treatment. The DOSA agreement stated, "A DOSA sentence requires that you participate in treatment offered by the Department of Corrections (DOC). . . . If you refuse to abide by the terms and conditions imposed by the treatment program, you may be referred to the DOC hearings unit and may be reclassified to serve the remaining original balance of your sentence." State's Ex. 4. The chemical dependency treatment form notified program participants that they would be expected to "[r]efrain from any physical violence, threats or acts of physical violence, abusive arguing or inappropriate language." State's Ex. 5. It also stated that DOC could revoke an offender's DOSA sentence if the offender was unsuccessfully discharged from any level of chemical dependency treatment.

In June 2007, Neidigh began an in-patient treatment program at Stafford Creek Corrections Center called the "Odyssey" program. Conflicts soon developed between Neidigh and Odyssey staff. According to classification counselor Jennifer Machovsky, Neidigh was "staffed for his aggressive behavior" on his second day in the program. On July 24, Odyssey staff asserted that Neidigh threatened and intimidated another offender. Neidigh admitted that he loudly told another inmate to "take his hands off me" but claimed that he never threatened anyone. DOSA Revocation Hearing Transcript

(Oct. 1, 2007) at 11.

On August 1, Odyssey staff presented Neidigh with a "behavior contract" to address their concerns about his conduct. According to Machovsky, Neidigh was defiant and his hostile behavior escalated to the point that a corrections officer had to be called. Neidigh eventually agreed to sign the document, which required him to work on changing self-destructive behaviors, including "[t]aunting and belittling fellow family members (Disrespect)" and "[b]eing physically intimidating towards fellow family members." State's Ex. 8. He also agreed to undertake specific corrective actions with the understanding that his failure to do so could result in DOSA revocation.

On August 17, Neidigh was placed in segregation again after he was accused of assaulting another offender. According to the DOC infraction allegation, Counselor Jones witnessed offenders Keene and Stoner throwing punches at each other, and he said, "Break it up." Serious Infraction Report (Aug. 17, 2007). Neidigh then grabbed Keene around the neck until Jones told him to let go. According to Neidigh, the reason he grabbed Keene was that he believed Jones had ordered him to help break up the fight. Neidigh obtained witness statements to support his version of the incident. A DOC hearing officer conducted a prison discipline hearing and concluded that Neidigh was not guilty of assault.[1] However, after the hearing, another witness confidentially

[1] Prison discipline hearings generally operate under the "some evidence" standard, rather than the more demanding "preponderance of the evidence" standard applicable to DOSA revocation hearings. Under the "some evidence" standard, the discipline decision is affirmed if there is any evidence in the record that could support the hearing officer's conclusion. In re Pers. Restraint of McKay, 127 Wn. App. 165, 169, 110 P.3d 856 (2005).

reported that Neidigh was instigating during the fight, taunting the participants, and calling them belittling names. The prison investigation and intelligence division rated this information as reliable. Based on this statement, Odyssey staff concluded that Neidigh had violated his behavior contract, which identified taunting and belittling other inmates as one of his self-destructive behaviors. They also concluded that even though a DOC hearing officer found Neidigh not guilty of the assault infraction, his conduct during the fight still constituted a violation of their program's requirements because it amounted to an act of physical violence.

On September 17, Odyssey staff met to discuss Neidigh. Two additional confidential informants had complained about Neidigh intimidating inmates in the program. The prison investigation and intelligence division rated these complaints as reliable. Odyssey staff uniformly agreed that Neidigh should be terminated from the treatment program and that his DOSA sentence should be revoked. They alleged that Neidigh was guilty of infraction 762 based on their decision to terminate him from the program.[2] On the infraction form, they wrote that Neidigh "exhibited a lack of

[2] Under DOC Policy 670.655(VIII)(B)(1), "After alternatives to retain the offender in the program have been addressed and it has been determined that termination is appropriate, the appropriate staff will initiate DOC 20-052 Initial Serious Infraction Report citing a 762 for offenders in Prison or Work Release." Under WAC 137-25-030, which defines serious prison discipline infractions, "762" is defined as "Failing to complete, or administrative termination from, DOSA substance abuse treatment program. Note: This infraction must be initiated by authorized staff and heard by a community corrections hearing officer in accordance with chapter 137-24 WAC [which contains special procedures governing DOSA revocation hearings]."

Based on this language, it appears that prison regulations do not allow program staff to unilaterally expel someone from a prison drug treatment program. An independent hearing officer must first agree that there is a legitimate basis to terminate an offender from the program. The procedural rules used to make this determination, which include use of the preponderance of the evidence standard, provide greater

therapeutic gain, through defiance, intimidation, and a negative attitude towards the treatment process and that his progress in treatment was so deficient as to warrant termination . . . and a formal recommendation that a revocation of [his] DOSA sentence be considered." State's Ex. 11.

Neidigh was timely served with written notice of the revocation hearing and presented with the documentary evidence supporting the 762 infraction allegation (except for the confidential statements described above). The notice informed Neidigh of his rights, including the following:

- To have a neutral and detached hearing officer conduct your hearing.
  . . . .
- To present your case to the Hearing Officer. . . . [N]o other person may represent you in presenting your case. There is no right to an attorney or counsel.
- To confront and cross-examine witnesses appearing and testifying at the hearing.
  . . . .
- To have witnesses provide testimony on your behalf, either in person or in a witnessed statement/affidavit. However, outside witnesses may be excluded due to institutional concerns. . . .

State's Ex. 12.

Neidigh's DOSA revocation hearing took place on October 1. The hearing officer initially verified that the documentary evidence and notice of rights were timely served on Neidigh. Neidigh agreed that he had been served, but objected to his inability to call live witnesses. The hearing officer responded that the prison facility

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protection to an inmate than the rules that apply to typical prison discipline hearings. Compare chapter 137-24 WAC with chapter 137-28 WAC; see also McKay, 127 Wn. App. at 170 and due process discussion, infra.

was within its rights to bar live witnesses out of institutional concerns and that he would fully consider Neidigh's written witness statements. Neidigh noted that he had requested Corrections Officer Bornstein as a witness, but Machovsky testified that the officer had not responded to the request.

Machovsky testified in favor of the revocation by reading from a series of progress notes about Neidigh's behavior in the program. During this testimony, she accurately summarized the contents of the confidential reports. Neidigh objected to Machovsky's characterizations and presented witness statements from other inmates supporting his explanation of the August 17 altercation—that he was simply breaking up a fight. He also presented statements from other members of the program who felt that he was a positive member of their therapeutic treatment community. The hearing officer conducted the hearing informally, permitting Neidigh and Machovsky to question each other and argue about the legitimacy of his termination from the program.

Applying the preponderance of the evidence standard of proof, the hearing officer ruled that Neidigh was guilty of failing to comply with DOSA treatment requirements. The hearing officer then stated, "And I am going to revoke your DOSA . . . I don't see any alternative at this time." State's Exhibit 25 at 50. The hearing officer explained:

> [O]ne of the things the prosecutors and judges told us that is when we're gonna do this program the offender is going to get a big break. They don't, they did not want them to get any additional breaks what so ever. It says that if you violated then your DOSA should be revoked and then you should do your time. . . .
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> . . . In this particular case it looked like you were doing some good stuff, but it wasn't enough to keep you in the program. You, you just being to disruptive.

State's Ex. 25 at 49.

DOC reclassified Neidigh and determined that his earliest possible release date would be April 1, 2011. Neidigh then filed this personal restraint petition.

ANALYSIS

Statutory Authority

Neidigh contends that he is being illegally detained in prison because DOC lacked statutory authority to revoke his DOSA sentence. He argues that the version of RCW 9.94A.660(5) in effect at the time of his offense gives DOC authority to revoke an offender's DOSA sentence only after the offender has been released to community custody, not when the offender is still in confinement. Issues of statutory authority are issues of law, reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The legislature enacted the drug offender sentencing alternative in 1995 to provide a treatment-oriented alternative to the standard sentence that would otherwise be required under the Sentencing Reform Act. State v. Kane, 101 Wn. App. 607, 609, 5 P.3d 741 (2000) (citing Laws of 1995, ch. 108). Under the DOSA program, an eligible offender serves less time in prison and more time in community custody. At the same time, the offender is subject to increased supervision and is required to undergo substance abuse treatment. RCW 9.94A.660(5)(a)–(b); State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005).

RCW 9.94A.660(5) governs prison-based DOSA's like the one here. At the time of Neidigh's offense, this statute provided,

> (5) The prison-based alternative shall include:
>
> (a) A period of total confinement in a state facility for one-half of the midpoint of the standard sentence range or twelve months, whichever is greater. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections;
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> (b) The remainder of the midpoint of the standard range as a term of community custody which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services. If the department finds that conditions have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court;
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> (c) Crime-related prohibitions including a condition not to use illegal controlled substances;
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> (d) A requirement to submit to urinalysis or other testing to monitor that status; and
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> (e) A term of community custody pursuant to RCW 9.94A.715 to be imposed upon failure to complete or administrative termination from the special drug offender sentencing alternative program.

Former RCW 9.94A.660(5) (2006) (emphasis added).

DOC revoked Neidigh's DOSA based on the following language in RCW 9.94A.660(5)(b): "An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court." Neidigh reads "the program" to refer only to the substance abuse treatment program described earlier in subsection (b) as being a mandatory part of an offender's community

[3] Neidigh also points to a 2008 amendment to the DOSA statute clarifying that the "conditions" referred to RCW 9.94A.660(5)(b) (the willful violation of which can result in DOSA revocation) are "conditions of community custody" and argues that an offender cannot violate community custody conditions before he is released to

custody.[3] In contrast, DOC reads "the program" to refer more generally to either the prison-based drug treatment program described in subsection (a) or the community custody-based drug treatment program described in subsection b. Neidigh's interpretation is reasonable given the placement of this sentence in subsection (b). But DOC's interpretation is also reasonable considering that very similar language appears in subsection (e), where the word "program" is used to refer to the DOSA program generally rather than the prison or community custody phase specifically. See RCW 9.94A.660(5)(e) ("failure to complete or administrative termination from the special drug offender sentencing alternative program").

If statutory language is subject to more than one reasonable interpretation, it is ambiguous. State v. Eichelberger, 144 Wn. App. 61, 66, 180 P.3d 880 (2008). Our fundamental duty in interpreting statutes is to discern and carry out the legislature's intent. State v. Madrid, 145 Wn. App. 106, 111, 192 P.3d 909 (2008). We consider the context, related provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); see also, In re Pers. Restraint of Albritton, 143 Wn. App. 584, 593, 180 P.3d 790 (2008) ("provisions of an act must be viewed in relation to each other and, if possible, harmonized to effect the act's overall purpose"). We may look to legislative history to resolve ambiguities and give effect to the

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community custody. But Neidigh's DOSA sentence was revoked because he failed to complete and was administratively terminated from the Odyssey program, not because he willfully violated community custody conditions. Moreover, it is possible to violate community custody conditions while incarcerated. See In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 819, 177 P.3d 675 (2008) ("It also seems very unlikely to us that the legislature intended that community custody conditions, such as no contact orders, would be suspended while an offender is in jail.").

legislature's intent, State v. Manro, 125 Wn. App. 165, 173, 104 P.3d 708 (2005), and we consider the sequence of all statutes relating to the same subject. Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143, 150, 736 P.2d 265 (1987). We avoid interpretations that will lead to unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d 453, 457, 963 P.2d 812 (1998).

Neidigh's proposed statutory interpretation leads to a strained result. According to Neidigh, DOC lacks authority to revoke an offender's DOSA for failing to complete drug treatment while in prison. Yet DOC is authorized to revoke an offender's DOSA for failing to complete drug treatment while released to community custody. But this interpretation leads to the anomalous result that DOC would have greater revocation authority for an offender in community custody than for an offender who is still in prison. Neidigh fails to explain why the legislature intended to create this discrepancy.[4] In fact, the history of the DOSA statute suggests that the legislature did not intend there to be such a difference.

In 2005, the legislature amended the DOSA statute to add a new residential chemical dependency treatment alternative to the traditional prison-based DOSA sentence. The legislature also changed some eligibility requirements and generally

[4] At oral argument, Neidigh's counsel argued that the prison environment can be stressful for inmates, which might lead them to act in ways that are inappropriate for a treatment environment. While this may be true, it does not follow from this that the legislature would intend to prevent DOC from being able to revoke an offender's DOSA for inappropriate behavior in a treatment program. If DOC were unable to use the possibility of revocation to encourage appropriate conduct, the efficacy of the prison treatment program—and by extension the DOSA program overall—would be undermined.

reorganized the statute. See Laws of 2005, ch. 460. Prior to these amendments, the prison portion and community custody portion of a DOSA sentence were both described in the same subsection of the statute and the provision requiring reclassification appeared in a separate subsection.[5] Former RCW 9.94A.660(2) (2004). From this structure, it is apparent that the revocation provision applied to both phases of the sentence. Moreover, in In re Personal Restraint Petition of McKay, 127 Wn. App. 165, 110 P.3d 856 (2005), this court considered a prison DOSA revocation conducted by DOC under this statutory regime. While we concluded that DOC did not use the correct standard of proof, no party suggested that DOC lacked statutory authority to revoke a prisoner's DOSA. McKay, 127 Wn. App. at 170.

Based on this history, DOC had authority under the former DOSA statute to revoke an offender's DOSA if the offender failed to complete or was administratively

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[5] Former DOSA statute RCW 9.94A.660 (2004) read in pertinent part:

"(2) [T]he judge may waive imposition of a sentence within the standard sentence range and impose a sentence that must include a period of total confinement in a state facility for one-half of the midpoint of the standard sentence range. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. . . .

"The court shall also impose:

"(a) The remainder of the midpoint of the standard range as a term of community custody which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services . . .

". . . .

"(5) An offender who fails to complete the special drug offender sentencing alternative program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court . . . ."

terminated from the DOSA program while still in prison. Thus, Neidigh contends that by merely moving the language from former RCW 9.94A.660(5) (2004) into RCW 9.94A.660(5)(b), the legislature intended to abrogate this authority. Yet in reviewing the legislative history, we find nothing to suggest that this was the legislature's intent. See Final B. Rep. on Engrossed Second Substitute H.B. 2015, 59th Leg., Reg. Sess. (Wash. 2005); H.B. Rep. on H.B. 2015, 59th Leg., Reg. Sess. (Wash. 2005); S.B. Rep. on Engrossed Second Substitute H.B. 2015, 59th Leg., Reg. Sess. (Wash. 2005). Neidigh cites State v. Roy, 126 Wn. App. 124, 128, 107 P.3d 750 (2005) for the proposition that a material change in a statute's wording gives rise to a presumption that the legislature intended to change the law. But the legislature made multiple changes to the DOSA statute with its 2005 amendments, mainly focused on the addition of a new residential option. We read the change Neidigh relies on—placement of the reclassification language in RCW 9.94A.660(5)(b)—as part of a reorganization that coincided with the creation of the residential treatment option rather than as a substantive change in itself.

Finally, we note that the legislature recently modified the DOSA statute again. See Substitute H.B. 1791, 61st Leg., Reg. Sess. (Wash. 2009) (effective Aug. 1, 2009). Under the new version of the prison-based DOSA option, the language authorizing DOC to revoke an offender's DOSA appears in a separate section from the sections requiring treatment during the prison portion and the community custody portion of the sentence.[6] As with the pre-2005 version of the DOSA statute, this

[6] "[RCW 9.94A.new section, effective August 1, 2009] provides in pertinent part: "(1) A sentence for a prison-based special drug offender sentencing alternative

structure indicates that DOC's authority to revoke an offender's DOSA applies to both the prison phase and the community-custody phase of the sentence. The legislative history suggests that this change was meant to clarify the legislature's intent. See Senate B. Rep. on S.H.B. 1791, 61st Leg., Reg. Sess. at 3 (Wash. 2009) ("Provisions are reorganized for clarity.").

Where a statutory change is aimed at clarifying an ambiguous, older statute, rather than responding to a differing court interpretation, the change can enlighten courts as to the original statute's meaning. Ravsten, 108 Wn.2d at 150-51. Here, there is no differing court interpretation, so we view the recent change to the DOSA statute as a clarification, showing that the legislature never intended to abrogate DOC's authority to revoke an offender's DOSA during the prison portion of the offender's sentence. Therefore, we conclude that DOC had statutory authority to revoke Neidigh's DOSA based on his failure to complete and his termination from the Odyssey program.

Due Process

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shall include:

"(a) A period of total confinement in a state facility . . .

"(b) One-half the midpoint of the standard sentence range as a term of community custody, which must include appropriate substance abuse treatment . . .

". . . .

"(2) During incarceration in the state facility, offenders sentenced under this section shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. . . .

"(3) If the department finds that conditions of community custody have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court."

Neidigh also contends that the DOC revocation hearing violated his due process rights. Under the federal and state constitutions, the State is prohibited from depriving individuals of liberty without due process of law. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. To determine what process is due in a particular situation, the court must examine (1) the individual's liberty interest, (2) the value of the proposed procedural safeguard to protect against erroneous deprivation of that interest, and (3) the State's interest, including administrative and financial burdens of the proposed procedure. In re Bush, 164 Wn.2d 697, 705, 193 P.3d 103 (2008) (citing Mathews v. Eldridge, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

In Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), the Court described the minimum due process requirements for parole revocation hearings. It emphasized that a parolee, having already been convicted in a criminal prosecution, was not entitled to the full panoply of rights available in such proceedings. Morrissey, 408 U.S. at 480. Nevertheless, the State was required to exercise "some orderly process" before inflicting a "grievous loss" on a parolee by terminating his or her liberty. Morrissey, 408 U.S. at 482. "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Morrissey, 408 U.S. at 484.

The Morrissey Court concluded that a parolee's minimum due process requirements include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present

> witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489. The Court also noted that the process should be flexible enough to consider evidence that would not be admissible in a criminal trial. Morrissey, 408 U.S. at 489. The Court did not reach the question of whether a parolee is entitled to the assistance of counsel, but in a subsequent decision involving probation revocation, it held that the right to counsel existed in some cases and should be determined on a case-by-case basis. Gagnon v. Scarpelli, 411 U.S. 778, 787–91, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

In Wolff v. McDonnell, 418 U.S. 539, 560–61, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the Court declined to extend the procedural protections required for probation and parole revocation hearings to prison disciplinary hearings. It concluded that the prisoner's liberty interest in credit for "good time" was fundamentally different from the individual interests at stake in parole and probation revocation and that the State's interest in maintaining a safe and orderly prison environment supported a lower level of procedural protection for inmates. In particular, the Court expressed concern that an "inflexible constitutional straitjacket" could inflame tensions between guards and inmates and inmates with each other, as well as interfere with important correctional goals. Bearing these considerations in mind, the Court held that prison officials could prevent prisoners from calling witnesses without violating their due process rights and

that a prisoner's ability to confront and cross-examine was subject to the sound discretion of prison officials. It also concluded that there was no right to counsel. In a subsequent decision, the Court held that prison discipline hearings that result in a loss of "good time" credits need only be supported by "some evidence" in the record. Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 455, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

In In re Personal Restraint of McNeal, 99 Wn. App. 617, 635–36, 994 P.2d 890 (2000), this court addressed the due process rights of offenders in the context of community custody revocation. The State argued that statutory language defining the revocation hearings as "inmate disciplinary proceedings" meant that offenders were not entitled to the due process protections established in Morrissey and that only the lesser due process protections described in Wolff were required. McNeal, 99 Wn. App. at 620–21. We rejected this argument, concluding that the liberty interest of individuals in community custody was more analogous to that of parolees and probationers than to that of inmates. McNeal, 99 Wn. App. at 627–634. Consequently, we held that due process requires that the protections outlined in Morrissey be employed in community custody revocation hearings. McNeal, 99 Wn. App. at 619. At the same time, we noted that probation and parole, with their focus on rehabilitation, are not identical to Washington's community custody system, which is primarily punitive in nature. McNeal, 99 Wn. App. at 634–35. We distinguished Scarpelli and held that due process did not require the State to permit counsel to participate in community custody revocation hearings. McNeal, 99 Wn. App. at 619, 634–35.

And in McKay, this court

considered a prison DOSA revocation similar to the one here. McKay was terminated from her prison-based drug treatment program based on accusations that she was late to class, slept during program hours, failed to complete work, and planned to forge a staff signature to cover for her missed work. McKay, 127 Wn. App. at 167. McKay denied the allegations, but the hearing officer determined she was guilty after telling her that the standard of proof was "'fairly low, probably like 30, 35 percent.'" McKay, 127 Wn. App. at 167. We held that McKay had "a significant liberty interest in the expectation of community custody as opposed to incarceration" and that DOC could not revoke her DOSA sentence unless she failed to live up to the treatment program's requirements. McKay, 127 Wn. App. at 170. We further held that due process required the hearing officer to use the preponderance of the evidence standard of proof rather than the "some evidence" standard to determine if McKay had failed to comply with the program's demands. McKay, 127 Wn. App. at 170. We did not address the adequacy of other procedural aspects of her DOSA revocation hearing.

We now address Neidigh's specific due process arguments.

A. Right to Call Witnesses

Pursuant to WAC 137-24-040, DOC informed Neidigh that he had the right to present witnesses on his behalf "either in person or in a witnessed statement," but that witnesses could be excluded due to institutional concerns. During the hearing, Neidigh complained that he could not present live witnesses testimony, but the hearing officer informed him that the facility was within its rights to disallow such testimony out of institutional concerns. Neidigh contends that this violated his due process rights.

Under Morrissey, a parolee has

the right to "present witnesses." Morrissey, 408 U.S. at 489. In McNeal, we held that this right applied to community custody violation hearings and that it was not satisfied by an offender's ability to present written witness statements if the offender preferred to call live witnesses. McNeal, 99 Wn. App. at 635–36. In contrast, the Court in Wolff held that due process did not give prisoners an unqualified right to call witnesses in prison discipline hearings and that prison officials could restrict witness evidence at their discretion. Wolff, 418 U.S. at 566. We acknowledged this holding in McNeal, but emphasized that a hearing occurring in the prison setting is a fundamentally different situation from a hearing occurring in the community setting.

> The Wolff Court was especially sensitive to the interests of the state in maintaining order and safety in a prison environment. For example, when discussing a prisoner's right to call witnesses, most of whom would be prisoners or prison authorities, the Court considered the tensions between inmates, and between inmates and prison authorities, and the disruption calling them could cause. In contrast, the procedures afforded parolees or probationers "do not themselves threaten other important state interests, parole officers, the police, or witnesses—at least no more so than in the case of the ordinary criminal trial." This is because the witnesses that an individual in community custody will seek to call are more likely to come from the community.

McNeal, 99 Wn. App. at 626–27 (footnote omitted). The unique circumstances associated with prison employees or fellow inmates providing evidence for or against an offender, including the risk of retaliation, the undermining of prison authority, and the general disruption that could result, all militate against granting a due process right to call live witnesses in prison hearings. Here, because Neidigh's hearing involved DOSA revocation rather than prison discipline, due process requires a more stringent standard of proof. McKay, 127 Wn. App. at 170. Nevertheless, considering the

legitimate state interest in maintaining safety and order in the prison environment, we conclude that Neidigh's due process rights were not violated when DOC only permitted him to use witness statements rather than call live witnesses.

Neidigh also claims that he wanted to call Corrections Officer Bornstein as a witness. But Machovsky testified during the hearing that the officer did not respond to Neidigh's request. In his personal restraint petition, Neidigh alleges that Bornstein later told him that he would have been available to testify, but that no one had conveyed Neidigh's request to him. There is, however, no evidence in the record to support this bare assertion, which is insufficient in itself to establish a due process violation. In re Cook, 114 Wn.2d 802, 813–14, 792 P.2d 506 (1990). In any event, Neidigh presented several witness statements supporting his version of events and his contention that he was a positive member of the Odyssey program. And it is clear from the record that the hearing officer considered these statements. Under these circumstances, Neidigh does not establish that his due process rights were violated by the witness procedure used at his hearing.

B. Right to Confront

Under Morrissey, an offender has the right to confront and cross-examine adverse witnesses unless the hearing officer finds good cause for not allowing confrontation. Morrissey, 408 U.S. at 489. In terms of hearsay, good cause can be established based on its reliability and the difficulty of procuring live witness testimony. State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157 (2005). The hearing process is meant to be flexible, and evidence that would not be admissible in a criminal trial can be considered. Morrissey, 408 U.S. at

489; see also State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999) (in special sex offender sentencing alternative revocation hearing, court may, for good cause, admit substitutes for live testimony including reports, affidavits and documentary evidence).

Neidigh objects to the use of confidential informant statements at his hearing. But the hearing officer complied with the procedures of WAC 137-28-300 for handling confidential informant information. The contents of the statements were accurately summarized for Neidigh—that he was "instigating" during the August 17 fight and that he was generally intimidating towards others in the Odyssey program—and he was given an opportunity to rebut these statements, which he did with his own testimony and his own witness statements. Further, the hearing officer specifically found good cause to admit the statements, noting that the informants were fearful of retaliation and that their statements were reliable based on the prison's investigation.[7] This is sufficient to comply with due process under both Wolff and Morrissey. Wolff, 418 U.S. at 568–69; Morrissey, 408 U.S. at 489. Neidigh also generally complains that Machovsky read from reports during the hearing, but both Morrissey and Wolff call for a

[7] Neidigh cites Hensley v. Wilson, 850 F.2d 269, 276 (6th Cir. 1988) for the proposition that the hearing officer must assess the reliability of confidential statements independent of an investigating officer's assessment. But the holding in Hensley was limited to situations where the sole or primary basis for imposing discipline was an informant's statement. Here, Neidigh's DOSA was revoked based on a range of documented conduct over a period of months, not simply because of the confidential statements of others in the program, so Hensley is inapplicable.

We caution hearing officers that good cause findings must be more than perfunctory in order to enable meaningful appellate review. See State v. Mewes, 84 Wn. App. 620, 621–22, 929 P.2d 505 (1997). Here, given the fact that the primary complaint against Neidigh was his intimidating behavior towards others, the hearing officer's finding about fear of retaliation was reasonable.

flexible approach to admitting such evidence. See Wolff, 418 U.S. at 569; Scarpelli, 411 U.S. at 782 n.5; Morrissey, 408 U.S. at 489. Neidigh does not establish any due process violation based on limitations on his ability to confront and cross-examine.

C. Right to a Neutral and Detached Hearing Officer

Neidigh contends that the hearing officer was not neutral and detached because he commented that judges and prosecutors did not want him to give DOSA offenders any additional breaks. He argues that under RCW 9.94A.660(5)(b), a hearing officer is not required to reclassify an offender for violating conditions, so the hearing officer's bias against leniency deprived him of a fair hearing. But the provision Neidigh relies on, which governs offenders who willfully violate community custody conditions, does not apply to him. Instead, the applicable provision requires DOC to reclassify offenders who fail to complete the treatment program. In context, we view the hearing officer's comment as an inartful explanation of this statutory mandate rather than as evidence of his actual bias.

D. Right to an Attorney

Neidigh next argues that DOC violated his right to due process by informing him he had no right to counsel. Neidigh relies on Scarpelli, in which the Court held that the right to counsel exists in some probation and parole revocation hearings.

> [T]he decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.

Scarpelli, 411 U.S. at 790. But this holding was limited to probation and parole revocation hearings.

In McNeal, we held that the right to counsel did not extend to community custody violation hearings, even though the minimum due process rights described in Morrissey generally apply in such hearings. McNeal, 99 Wn. App. at 635–36. In addition to noting the differences between probation or parole and community custody, we also emphasized that the added expense and administrative burden on the State of providing counsel, including increased delay and formalization of the hearings, weighed against providing a right to counsel—even on a case-by-case basis. In balancing the individual and state interests involved in community custody violation hearings, we concluded that these burdens on the state overrode the "marginal value counsel would provide." McNeal, 99 Wn. App. at 635.

Here, the balancing of individual and State interests tilts even more strongly against providing a right to counsel because of the unique prison environment.[8] We agree with the Supreme Court, which in Wolff, aptly described the prison hearing setting.

> The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process.

[8] Unlike probationers, parolees, and individuals on community custody, here we are concerned with the liberty interest of a person in total prison confinement.

> . . . .
> . . . [T]here would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account . . . .

Wolff, 418 U.S. at 562–63. And on the right to counsel in prison disciplinary hearings, the Court explained,

> As to the right to counsel, the problem as outlined in Scarpelli with respect to parole and probation revocation proceedings is even more pertinent here:
>
> > "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State–for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review–will not be insubstantial." [Scarpelli,] 411 U.S., at 787–788 (footnote omitted).
>
> The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held.

Wolff, 418 U.S. at 569–70. The State also has a critical interest in maintaining order and safety in prison, which would be undermined by significant delays in conducting prison hearings. See Wolff, 418 U.S. at

562. We conclude that the prison setting warrants a due process right to counsel even less than the community custody setting described in McNeal.

Just as due process does not require a right to counsel for community custody violation hearings, it does not require a right to counsel for in-prison DOSA revocation hearings.[9] The procedure used here was adequate to assure that Neidigh's DOSA revocation was based on "verified facts" and that the hearing officer's discretion was "informed by an accurate knowledge" of his conduct. We conclude that Neidigh's due process rights were not violated when DOC informed him he had no right to an attorney.

E. Hearing Decorum

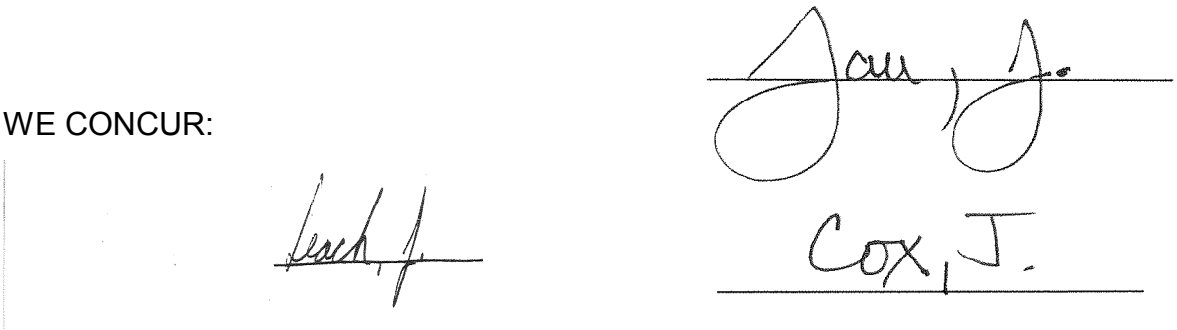
Finally, Neidigh argues that his due process rights were violated because the hearing lacked sufficient "decorum." But the critical issue is not whether the hearing was conducted formally or informally, but whether the process allows the hearing officer to reach a decision based on verified facts and accurate information. Here, Neidigh had notice of the allegation, was provided with the documentary evidence against him, had a chance to give his version of events to the hearing officer and present his witness statements, as well as to question Machovsky's rationale for termination. The hearing officer weighed the information provided by both sides and produced a written

[9] We acknowledge that there is language in State v. Ziegenfuss, 118 Wn. App. 110, 116, 74 P.3d 1205 (2003) suggesting that the right to counsel in community custody violation hearings is determined on a case-by-case basis. But this language is dicta, and, in any event, the prison environment of Neidigh's DOSA revocation makes his case distinguishable. We also acknowledge that under McKay, DOSA revocation hearings require more procedural protection than the prison disciplinary hearings analyzed in Wolff. However, the issue in McKay was the standard of proof required for DOSA revocation, not the existence of a due process right to counsel.

decision detailing the evidence he relied on and his rationale for revoking Neidigh's DOSA sentence. Neidigh contends that the hearing officer did not employ the preponderance of the evidence test, but the record directly contradicts this assertion, and there is sufficient evidence in the record to support the hearing officer's decision. Neidigh's due process rights were not violated.[1]

We deny Neidigh's petition.

WE CONCUR:



[1] Neidigh also argues that he is a victim of double jeopardy because his DOSA was revoked even after he was found not guilty of assault for the August 17 incident. But the hearing officer approved Neidigh's termination from the Odyssey program and revoked his DOSA based on a range of conduct over a several-month period, not simply the August 17 assault he was acquitted of, so his double jeopardy claim fails.